International Convention for the Protection of All Persons from Enforced Disappearance

Distr.: General
19 April 2017
English
Original: Spanish

Committee on Enforced Disappearances

Concluding observations on the report submitted by Cuba under article 29 (1) of the Convention*

1. The Committee considered the report submitted by Cuba under article 29 (1) of the Convention (CED/C/CUB/1) at its 199th and 200th meetings (see CED/C/SR.199 and 200), held on 6 and 7 March 2017. It adopted the present concluding observations at its 210th meeting, held on 14 March 2017.

A. Introduction

2. The Committee welcomes the report submitted by Cuba under article 29 (1) of the Convention, which was drafted in accordance with the reporting guidelines, and the information contained therein. The Committee also appreciates the open and constructive dialogue with the delegation of the State party on the measures taken to implement the provisions of the Convention, which has dispelled many of its concerns. The Committee also thanks the State party for its written replies (CED/C/CUB/Q/1/Add.1) to the list of issues (CED/C/CUB/Q/1), which were supplemented by the oral statements made by the delegation in the course of the dialogue, and for the additional information provided in writing.

B. Positive aspects

3. The Committee welcomes the measures taken by the State party in areas relevant to the Convention and its ratification of the following core United Nations human rights instruments:

(a) International Convention on the Elimination of All Forms of Racial Discrimination;

(b) Convention on the Elimination of All Forms of Discrimination against Women;

(c) Convention on the Rights of the Child and its Optional Protocols on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict;

(d) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(e) Convention on the Rights of Persons with Disabilities.

* Adopted by the Committee at its twelfth session (6-17 March 2017).

4. The Committee welcomes the fact that the State party has signed the International Covenant on Civil and Political Rights, although it observes that ratification is still pending.

5. The Committee notes that the State party has consulted civil society in connection with the preparation of its report under article 29 (1) of the Convention.

C. Principal subjects of concern and recommendations

6. The Committee considers that, at the time of adoption of the present concluding observations, the legislation in force in the State party did not comply fully with the obligations of States parties to the Convention. The Committee calls on the State party to implement its recommendations, which have been formulated in a constructive and cooperative spirit in order to assist the State party in giving effect, in law and in practice, to the latter's obligations under the Convention. The Committee encourages the State party to use the fact that a number of legislative reforms are currently under consideration, particularly the updating of the Criminal Code, as an opportunity to implement the recommendations made in the present concluding observations and to ensure that its legal framework is fully compliant with the Convention.

General information

Individual and inter-State communications

7. The Committee notes that the State party has not yet recognized the Committee's competence to receive and consider individual and inter-State communications under articles 31 and 32 of the Convention. While noting the State party's statement that it has in place an inter-institutional system guaranteeing that complaints and reports of human rights violations are received, processed and addressed, the Committee regrets that the State party considers that it is not as yet necessary to make the declarations referred to in articles 31 and 32 of the Convention (arts. 31 and 32).

8. **The Committee encourages the State party to recognize the Committee's competence to receive and consider individual and inter-State communications under articles 31 and 32 of the Convention with a view to reinforcing the protection against enforced disappearances that is provided for in the Convention.**

National human rights institution

9. The Committee notes the information provided by the State party concerning the existence of an inter-institutional system guaranteeing that complaints and reports of human rights violations are received, processed and addressed. It regrets, however, that the State party has not established an independent national human rights institution compliant with the Principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).

10. **The Committee encourages the State party to consider establishing an independent national human rights institution in conformity with the Paris Principles, the mandate of which would include the promotion and protection of the rights enshrined in the Convention.**

Definition and characterization of enforced disappearance as an offence (arts. 1-7)

Characterization of enforced disappearance as an offence

11. The Committee is concerned that enforced disappearance has not yet been incorporated into the State party's legislation as an autonomous offence and, in that regard, recalls its position that only the characterization of enforced disappearance as an autonomous offence would enable States parties to comply with the obligation arising out of article 4 of the Convention, which is closely related to other obligations of a legislative

nature, such as those in articles 6 and 7. However, the Committee notes with interest the information provided by the State party that "the studies currently being completed in connection with the amendment and updating of the Criminal Code have adopted a comprehensive approach to the changes that should be made, which include a more explicit characterization of the offence of enforced disappearance that is consistent with the Convention". The Committee also notes that the State party has still not specifically characterized enforced disappearance as a crime against humanity, as set out in article 5 of the Convention. The Committee further takes note of the information provided by the State party that, although it remains on the statute books, the death penalty has not been imposed since 2003 (arts. 2-7).

12. **The Committee recommends that the State party adopt the necessary legislative measures to ensure that, as soon as possible:**

(a) **Enforced disappearance is incorporated into national legislation as an autonomous offence in accordance with the definition contained in article 2 of the Convention and carries appropriate penalties that take into account the extreme seriousness of the offence, while avoiding the imposition of the death penalty;**

(b) **Enforced disappearance is characterized as a crime against humanity, in accordance with article 5 of the Convention, while avoiding the imposition of the death penalty.**

Criminal responsibility of superiors

13. While taking note of the legal provisions that may be applied with regard to the criminal responsibility of superiors, in particular the offences of being an accessory after the fact (Criminal Code, art. 160.1) and failure to report an offence (Criminal Code, art. 161), the Committee is concerned that existing legislation does not comply fully with the obligation contained in article 6 (1) (b) of the Convention (art. 6).

14. **The Committee recommends that the State party adopt the legislative measures necessary to specifically incorporate into domestic law the criminal responsibility of superiors, in accordance with article 6 (1) (b) of the Convention.**

Criminal responsibility and judicial cooperation in relation to enforced disappearance (arts. 8-15)

Statute of limitations

15. The Committee notes with interest that, pursuant to article 64.5 of the Criminal Code, provisions on the statute of limitations for criminal prosecution are not applicable to crimes against humanity. However, it notes with concern that, under article 64.1 of the Code, criminal proceedings relating to offences subject to a statute of limitations become time-barred "from the date on which the offence was committed" and that domestic law does not seem to provide for any exceptions for offences of a continuous nature (art. 8).

16. **Emphasizing the continuous nature of enforced disappearance, the Committee recommends that the State party take the measures necessary to establish expressly that, in accordance with article 8 (1) (b) of the Convention, the term of limitation for criminal proceedings in respect of enforced disappearance, or other continuous offences applied instead of it where enforced disappearance is not specifically criminalized, commences from the moment when the enforced disappearance ceases.**

Independence of the judiciary

17. The Committee takes note of the information provided by the State party concerning existing guarantees on the independence and impartiality of the courts. In particular, it notes that article 122 of the Constitution provides that judges are independent and owe obedience only to the law. However, the Committee observes that, under article 121 of the Constitution, "the courts constitute a system of organs of the State structured to be functionally independent from any other organ and subordinate in rank to the National

Assembly of People's Power and the Council of State". While noting the statement of the State party that the hierarchical subordination of the courts to the National Assembly and the Council of the State does not entail interference in judicial functions or in the settlement of a particular case, the Committee is concerned that the subordination of the courts to other organs of the State may affect the guarantee of the independence of the courts required under the Convention in hearing cases of enforced disappearance. The Committee emphasizes the importance attaching to the independence of the authorities responsible for prosecuting offences under the Convention in order to guarantee thoroughness and impartiality in the investigation, trial and sanction of cases of enforced disappearance. The Committee further observes that the issue of the independence of the judiciary in the State party was the subject of a recommendation made by the Committee against Torture in its latest concluding observations (CAT/C/CUB/CO/2, para. 18) (arts. 11 and 12).

18. **The Committee recommends that the State party adopt the measures necessary to guarantee the full independence of the judiciary and other branches of government.**

Military jurisdiction

19. The Committee notes with concern that acts of enforced disappearance may fall under the jurisdiction of military courts, given that, according to the information provided by the State party, military courts are competent to hear criminal proceedings for any act of which a member of the military is accused, even where one of the persons involved or the victim is a civilian, and that military courts may try criminal cases for acts committed in military zones, irrespective of whether the persons who participated in such acts have civilian or military status. While noting that the military courts may decline jurisdiction in favour of the ordinary courts, the Committee recalls its position that, in principle, military courts do not offer the guarantees of independence and impartiality required by the Convention for trying cases of enforced disappearance (arts. 11 and 12).

20. **The Committee, recalling its statement on enforced disappearances and military jurisdiction (see document A/70/56, annex III), recommends that the State party take the legislative or other measures necessary to ensure that investigations and trials relating to enforced disappearances remain expressly excluded from military jurisdiction in all cases and that cases of enforced disappearances can be investigated and tried only in the ordinary courts.**

Prevention and sanction of acts that may hinder the conduct of investigations

21. The Committee welcomes the information provided by the State party that persons suspected of having participated in carrying out an enforced disappearance can be suspended from their duties until an investigation is completed. However, it notes that the State party does not provide for a mechanism to ensure that law enforcement or security forces, whether civilian or military, whose members are suspected of involvement in the commission of an enforced disappearance do not participate in the investigation (art. 12).

22. **In order to strengthen the existing legal framework and guarantee the proper application of article 12 (4) of the Convention, the Committee recommends that the State party adopt legal provisions that expressly establish a mechanism to ensure that law enforcement or security forces, whether civilian or military, whose members are suspected of involvement in the commission of an enforced disappearance do not participate in the investigation.**

Measures to prevent enforced disappearances (arts. 16-23)

Non-refoulement

23. The Committee welcomes the information provided by the State party about the measures adopted to ensure that a person may not be transferred, expelled, extradited or surrendered, if it is considered that he or she would be in danger of being subjected to enforced disappearance. It notes, however, that there is no express prohibition under domestic law against carrying out an expulsion, return, surrender or extradition where there

are substantial grounds for believing that the person would be in danger of being subjected to enforced disappearance (art. 16).

24. **The Committee recommends that the State party consider incorporating into its domestic legislation an explicit prohibition against carrying out an expulsion, return, surrender or extradition where there are substantial grounds for believing that the person concerned would be in danger of being subjected to enforced disappearance.**

Access to a lawyer

25. The Committee notes with concern that, pursuant to the provisions of article 249 of the Criminal Procedure Act, a person deprived of liberty may establish communication and meet with his or her defence counsel only from the time when an order has been made to apply any one of the precautionary measures authorized under the Act, the majority of which, according to the information provided by the State party, are imposed between the first 24 and 72 hours, rather than from the time when the deprivation of liberty commenced (art. 17).

26. **The Committee recommends that the State party adopt the measures necessary to guarantee, in law and in practice, that all persons deprived of liberty have access to a lawyer from the outset of the deprivation of liberty.**

Authority responsible for ordering pretrial detention

27. The Committee is concerned that, according to the Criminal Procedure Act, the power to order pretrial detention lies with the prosecutor, it being the prosecutor who is responsible for instituting and conducting public criminal proceedings as the representative of the State. In that regard, the Committee takes note of the information provided by the State party that persons under arrest are not brought before a judge until the investigation process has been completed and the proceedings submitted which enable the case to be heard and the oral trial to commence (art. 17).

28. **The Committee recommends that the State party adopt the measures necessary to ensure that all persons under arrest who are not released are brought promptly before a judge for the hearing of an application for the adoption of any measure entailing deprivation of liberty, and most particularly pretrial detention.**

Inspection of places of deprivation of liberty

29. The Committee notes the information provided by the State party concerning State and non-State agencies that may visit places where persons deprived of liberty are held. In particular, it notes with interest that the Attorney General's Office conducts regular, mostly unannounced, inspections of prison centres and facilities. It observes, however, that no specific independent mechanism has been established to carry out regular visits to all the places where persons deprived of liberty may be held. The Committee considers that such a mechanism could be instrumental in preventing violations of the rights and obligations contained in the Convention (art. 17).

30. **The Committee recommends that the State party establish a specific independent mechanism with the power to undertake, without hindrance, regular unannounced visits to any place that may hold persons deprived of liberty. The Committee invites the State party to reconsider ratification of the Optional Protocol to the Convention against Torture.**

Measures to provide reparation and to protect children against enforced disappearance (arts. 24 and 25)

Right to obtain reparation and prompt, fair and adequate compensation

31. The Committee takes note of the information provided by the State party on legislation governing matters relating to compensation and reparation for harm or damage

arising from unlawful conduct or acts. It is, however, concerned that domestic law does not provide for a comprehensive system of reparation that fully meets the requirements of article 24 (4) and (5) of the Convention (art. 24).

32. **The Committee recommends that the State party adopt the measures necessary to guarantee that domestic legislation provides for a comprehensive system of reparation that fully meets the requirements of article 24 (4) and (5) of the Convention and other international standards on the subject; that it be sensitive to victims' individual characteristics, taking into account, for example, their sex, sexual orientation, gender identity, age, ethnic origin, social status and disability; and that it should apply even where criminal proceedings have not been instituted against the alleged perpetrators.**

Legal situation of disappeared persons whose fate has not been clarified and that of their relatives

33. The Committee takes note of the information provided by the State party on the provisions of the Civil Code governing the declaration of absence and the declaration of presumption of death. In that regard, it is concerned that a disappeared person may be declared presumed dead once the time limit laid down in the Code has expired, whereupon the persons concerned can exercise the same rights that they would have had if the death had been medically certified. The Committee considers that, in view of the continuous nature of enforced disappearance, on principle and unless specific evidence shows otherwise, there is no reason to presume the death of the disappeared person until his or her fate has been determined (art. 24).

34. **In the light of article 24 (6) of the Convention, the Committee recommends that the State party adopt the measures necessary to guarantee that domestic law deals appropriately with the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights, without the need to declare the disappeared person to be presumed dead. In that respect, the Committee encourages the State party to set up a procedure for obtaining a declaration of absence as a result of enforced disappearance.**

Legislation on the wrongful removal of children

35. While noting the offences of substituting one child for another, and the sale and trafficking of minors, the Committee is concerned that existing laws do not specifically penalize the acts relating to the wrongful removal of children referred to in article 25 (1) (a) of the Convention (art. 25).

36. **The Committee recommends that the State party adopt the necessary legislative measures to make the actions described in article 25 (1) (a) of the Convention specific offences and that it establish penalties for such actions commensurate with their extreme seriousness.**

D. Dissemination and follow-up

37. The Committee wishes to recall the obligations entered into by States on ratifying the Convention and, in this regard, urges the State party to ensure that all the measures it adopts, whatever their nature and from whatever branch of government they emanate, are fully compliant with the obligations it assumed on ratifying the Convention and other relevant international instruments.

38. The Committee further wishes to emphasize the particular cruelty with which enforced disappearances affect the human rights of women and children. Women who are subjected to enforced disappearance are particularly vulnerable to sexual violence and other forms of gender violence. Women members of a disappeared person's family are particularly vulnerable to sustaining serious adverse social and economic effects and suffering violence, persecution and reprisals as a result of their efforts to locate their loved

ones. For their part, children who are victims of enforced disappearance, either by being subjected to disappearance themselves or by suffering the consequences of the disappearance of their relatives, are particularly vulnerable to multiple violations of human rights, including substitution of their identity. In this context, the Committee places special emphasis on the need to incorporate gender perspectives adapted to the sensitivities of girls and boys when implementing rights and obligations under the Convention.

39. The State is encouraged to ensure broad dissemination of the Convention, the text of its report under article 29 (1) of the Convention, its written replies to the list of issues prepared by the Committee and the present concluding observations in order to raise awareness on among the judicial, legislative and administrative authorities, civil society and non-governmental organizations active in the State party, as well as the population in general. The Committee further encourages the State party to promote the involvement of civil society in the process of implementing the present concluding observations.

40. In accordance with the Committee's rules of procedure, the State party is requested to provide relevant information on the implementation of the recommendations made by the Committee in paragraphs 26, 28 and 30 of the present concluding observations by 17 March 2018.

41. Under article 29 (4) of the Convention, the Committee requests the State party, by 17 March 2023, to provide specific, updated information on the implementation of all its recommendations, as well as any other new information on the implementation of the obligations set out in the Convention, in a document prepared in accordance with the Guidelines on the form and content of reports under article 29 to be submitted by States parties to the Convention (CED/C/2, para. 39). The Committee encourages the State party, in the process of preparing this information, to continue to consult civil society, in particular organizations of victims' relatives.